

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

LARRY GILLASPY and CONNIE SCORZA,
individually and as Husband and Wife;
RAYMOND G. VAUGHAN and VICKIE VAUGHAN,
individually and as Husband and Wife,

Plaintiffs,

v.

No. CIV-06-284 MV-CG

TOWN OF SILVER CITY; STATE OF NEW MEXICO,
REGULATION AND LICENSING DEPARTMENT,
CONSTRUCTION INDUSTRIES DIVISION;
WILLIAM R. HANKINS; MOGOLLON CORP.;
VIC TOPMILLER; SUN MOUNTAIN AMERICA, INC.;
CAROL THOMPSON dba THOMPSON REALTY/CENTURY 21;
ROBERT M. ROWLAND; and DOES 1 through 50, inclusive,

Defendants.

MEMORANDUM OPINION AND ORDER

THIS MATTER comes before the Court on Plaintiffs' Motion to File a First Amended Complaint (Doc. No. 60, filed November 9, 2006). For the reasons stated below, the Court shall **GRANT** Plaintiffs' Motion to File a First Amended Complaint. *See* Fed. R. Civ. P. 15(a) (leave to amend shall be freely given when justice so requires).

Plaintiffs' proposed First Amended Complaint adds several new defendants, new allegations, and new causes of action. (*See* Motion at 4-5, Ex. A). Defendant State of New Mexico ("State") opposes the motion on several grounds. (*See* State's Resp. at 2, Doc. No. 65, filed November 28, 2006).

The State argues that Plaintiffs caused undue delay and acted in bad faith because Plaintiffs did not explain why they waited until November 9, 2006, to file their request for leave to

file their amended complaint. (*See id.* at 3-4). The Court disagrees. In its Order Setting Pretrial Deadlines (Doc. No. 50, filed October 12, 2006), the Court set a standard track deadline of November 10, 2006, for Plaintiffs to join additional parties and amend pleadings. Plaintiffs complied with the Court's deadline and, therefore, did not cause undue delay or act in bad faith.

The State also argues that Plaintiffs' delay caused prejudice to the State. (*See id.* at 4). Consequently, the State concludes, justice does not require this Court to permit Plaintiffs to file an amended complaint. (*See id.* at 4). The Court does not agree. The State asserts that because of Plaintiffs' delay, it was required to participate in a scheduling conference, file the instant response, and "is now forced to file additional pleadings as Plaintiffs assert new and unsubstantiated allegations against the [State and State employees]." (*See id.* at 4). The State identifies no other prejudice that it will suffer if the Court grants Plaintiffs' Motion. *See McKnight v. Kimberly Clark Corp.*, 149 F.3d 1125, 1130 (10th Cir. 1998) (defendant would be prejudiced when many key individuals would have had to be deposed again if complaint were amended, and plaintiff was aware of information on which proposed amendment was based prior to filing original complaint).

The State also argues that the Court should deny Plaintiffs' request for leave to amend their complaint because the proposed amended complaint cannot withstand a motion to dismiss and fails to state a claim upon which relief can be granted. (*See* Resp. at 8-23). The State's arguments, however, only apply to claims against the State and its individually identified employees. (*See id.* at 2, 8-23). The proposed amended complaint adds several individual employees of Defendant Town of Silver City and one person, not a Town employee, as defendants. (*See* Motion at 4-5). The proposed amended complaint also adds additional claims

against non-State parties. (*Id.*). The State has not demonstrated the futility of amendment. The Court will, therefore, grant Plaintiffs' Motion to File a First Amended Complaint. *See Foman v. Davis*, 371 U.S. 178, 182 (1962) ("If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits").

A "pleading that has been amended under Rule 15(a) supersedes the pleading it modifies and remains in effect throughout the action unless it subsequently is modified." *Gilles v. United States*, 906 F.2d 1386, 1389 (10th Cir. 1990). Because it is granting Plaintiffs' Motion to File a First Amended Complaint, the Court shall deny as moot the pending motions to dismiss Plaintiff's initial complaint. Defendants may file motions to dismiss Plaintiffs' First Amended Complaint.

IT IS, THEREFORE, ORDERED that Plaintiffs' Motion to File a First Amended Complaint (Doc. No. 60, filed November 9, 2006) is **GRANTED**.

IT IS ALSO ORDERED that Defendant State of New Mexico's Motion to Dismiss or Alternatively Motion for Summary Judgment (Doc. No. 26, filed July 5, 2007) is **DENIED as moot**.

IT IS ALSO ORDERED that Defendant Town of Silver City's Motion to Dismiss (Doc. No. 47, filed October 9, 2006) is **DENIED as moot**.

IT IS ALSO ORDERED that Defendant William Hankins Motion to Dismiss (Doc. No. 61, filed November 15, 2006) is **DENIED as moot**.

IT IS ALSO ORDERED that Defendant State of New Mexico's Request for Leave to File Supplemental Pleadings to its Motion to Dismiss or Alternatively Motion for Summary Judgment (Doc. No. 93, filed February 9, 2007) is **DENIED as moot**.

IT IS FURTHER ORDERED that Defendant Robert M. Rowland's Motion to Dismiss (Doc. No. 95, filed February 14, 2007) is **DENIED as moot**.

IT IS FINALLY ORDERED that Defendant of New Mexico's Request for Leave to File Supplemental Pleadings to its Motion to Dismiss or Alternatively Motion for Summary Judgment (Doc. No. 97, filed February 14, 2007) is **DENIED as moot**.

Dated the 23rd day of February, 2007.



MARTHA VÁZQUEZ
CHIEF UNITED STATES DISTRICT JUDGE

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